ORISSA HIGH COURT
CUTTACK

O.J.C. NO. 10191 OF 2000

In the matter of an application under Articles 226 and 227 of the Constitution of India.

State of Orissa ..... Petitioner

Versus

Ajaya Kumar Das & others ..... Opposite Parties

For Petitioner - Mr. A. Routray,
Addl. Government Advocate

For Opp.Parties - Mr. N.C. Mohanty
(for opposite party no.1)

M/s S.S. Das, P.K.Nayak and
K.C. Khuntia.
(for intervenor-opp.parties)

PRESENT: -

THE HON'BLE MR. JUSTICE I.M.QUDDUSI
AND
THE HON'BLE MR. JUSTICE PRADIP MOHANTY

Date of hearing & judgment : 02.03.2006

I.M.QUDDUSI,J. This writ petition has been filed by the State against the judgment and order dated 02.12.1999 passed by the Orissa Administrative Tribunal, Cuttack Bench in T.A. No. 77 of 1989.

2. In fact, OJC No. 1770 of 1982 was filed by opposite party no.1 in this Court, which was transferred to the Tribunal. But the Tribunal held that since opposite party no.1 was serving in the Orissa State Electricity Board and no notification was issued to put

that Board under the jurisdiction of the Tribunal, it was unable to decide that case. Accordingly, the matter was re-transferred to this Court which was disposed of vide order dated 08.07.1991. The State filed S.L.P. against the said order in the Hon'ble Supreme Court which was dismissed as withdrawn vide order dated 22.07.1994 with liberty to opposite party no.1 to approach this Court by way of review. Thereafter, Civil Review No.125 of 1994 was filed and the same was disposed of by this Court on 07.08.1996 with the observation that since opposite party no.1 was a Government servant and the dispute related to the payment of salary or fixation of pay, it was well within the jurisdiction of the Tribunal. Thus, the matter was again transferred to the Tribunal and has been disposed of vide the impugned order.

3. The brief facts of the case are that opposite party no.1 was appointed as an Overseer (Electrical) by the State Government. Thereafter, he was deputed to serve in the Orissa State Electricity Board in the then pay scale of Rs.185-325/-. The post of Overseer was renamed as Sub-Assistant Engineer. Since scale of pay of the Sub-Assistant Engineers appointed directly by the O.S.E.B. was higher in comparison to opposite party no.1 and other similarly situated persons, who were deputed to the O.S.E.B. and were initially appointed by the Government as Overseers, it was decided to provide them reducible personal pay so that they may not get lesser salary in comparison to the Sub-Assistant Engineers directly appointed by the O.S.E.B. The dispute had arisen when opposite party no.1 and other similarly situated persons were promoted to the post of Assistant Engineer in the year 1981. At that time, the pay of opposite party no.1 was Rs.874/- in the then scale of pay of Rs.480-970/-. But his pay on promotion was fixed at Rs.850/-, which was lesser than the pay drawn by him as a Sub-Assistant Engineer.

4. The State Government issued two circulars in that regard, which are contained in Annexures-4 and 5 of the writ

application. In the circular dated 18th June, 1982 contained in Annexure-4, the Government directed that the completed years of service rendered by Sub-Assistant Engineers under the O.S.E.B. should be treated as having been rendered under the Government in the Government scale of Sub-Assistant Engineers and their pay in the scale of Assistant Engineers under the Government should be fixed following the principle prescribed under Rule 74(b) of the Orissa Service Code, meaning thereby that the pay of Sub-Assistant Engineers of the O.S.E.B. should be fixed in the same manner as is being done had they been the Sub-Assistant Engineers under the Government.

5. The above direction was modified by subsequent circular dated 17th March, 1983 contained in Annexure-5 in which it was observed by the Government that the Sub-Assistant Engineers recruited by the Government draw pay in the time scale of Rs.410-840/-, whereas the Board recruited Sub-Assistant Engineers draw pay in the time scale of Rs.440-970/- instead of Rs.440-810/- as mentioned in the earlier Government Order. Since the scale of pay of Sub-Assistant Engineers recruited by the Government is not identical with the scale of pay of Board's Sub-Assistant Engineers, while fixing the pay of Sub-Assistant Engineers of the Board on their promotion as Assistant Engineers applying the principle of pay fixation as laid down in the above mentioned Government Order dated 18.06.1982, in certain cases the pay fixed in the scale of Assistant Engineers becomes less than the pay last drawn as Sub-Assistant Engineer under the Board. As such, in order to avoid hardship and to meet the ends of justice, the Government had decided that in case of promotion of Sub-Assistant Engineers of the Board to the rank of Assistant Engineer under Government, if the pay so fixed as per principle laid down in the Government Order No.21537 dated 18.06.1982 becomes less than the pay last drawn by them under the Board, the difference

may be allowed to them by R.P.P. (reducible personal pay) to be absorbed in future increments.

6. Aggrieved by the above two Government Orders, opposite party no.1 approached this Court by filing O.J.C. No.1770 of 1982 which was ultimately transferred to the Tribunal and registered as Transferred Application No.77 of 1989, as mentioned above. The said Transferred Application was disposed of by the Tribunal vide the impugned judgment and order dated 23.12.1999 with the following direction :

> "Having bestowed our anxious considerations on the submissions of the learned counsel for the applicant and perused the relevant papers on record, we are of the opinion that annexure-6 decision of the Government regarding protection of pay is in effect a negative of the concept for pay protection. It was in pursuance of Government decision that, though recruited by the O.S.E.B. they were promoted by the Government to the rank of Assistant Engineer when they were enjoying higher scale of pay than the Sub Assistant Engineers under the Government. Since the applicant was drawing pay at Rs.874.00 per month in the scale of pay of Rs.480.00-970.00 he could not be dragged to a lower scale of pay of Rs.410.00-840.00 and his pay was fixed at Rs.850.00 leading to reduction in his pay to the extent of Rs.110.00 per month. This can hardly be called protection of pay, which is sought to be ensured by annexure-6 instruction. We, therefore, find annexure-6 instruction to be unfair and unreasonable and direct that the applicant's pay on his promotion to the rank of Assistant Engineer (Electrical) be fixed taking his last pay drawn in the rank of S.A.E. into account and following the provisions of Rule 74(b) of the Orissa Service Code and the differential salary paid to him within a period of 4 months from the date of receipt of a copy of this order."

7. Since the direction of the Tribunal was not in consonance with the above-mentioned Government Orders contained in Annexures-4 and 5, the State Government filed the instant writ petition before this Court challenging the order of the Tribunal.

8. Before proceeding further, it is necessary to peruse the provisions of Rule 74(b) of the Orissa Service Code, which is extracted hereunder :

> "74(b). Where a Government servant holding a post is promoted or appointed to another post carrying duties and responsibilities of greater importance than those attached to the post held by him, initial pay in the time-scale of the higher post shall be fixed at the stage next above the pay notionally arrived at by increasing his pay in respect of the lower post by one increment at the stage at which such pay has accrued:
>
> Provided that where a Government servant, immediately before his promotion or appointment to a higher post, is drawing pay at the maximum of the time-scale of the lower post, his initial pay in the time-scale of the higher post shall be fixed at the stage, next above the pay notionally arrived at by increasing his pay in respect of the lower post by an amount equal to his last increment in the time-scale of the lower post:
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> Provided further that the provision of this sub-rule shall not apply when a Government servant holding a Class-I post is promoted or appointed to another Class-I post."

9. Since on getting promotion the pay of opposite party no.1 was reduced from Rs.870/- to Rs.850/-, it cannot be said that Rule 74(b) was made applicable properly in his case even though there was already an instruction in respect of grant of personal pay which is given under Rule 37 of the Orissa Service Code. The said Rule is quoted hereunder :

> "37. PERSONAL PAY means pay granted to a Government servant-
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> (a) to save him from a loss of substantive pay in respect of a permanent post other than a tenure post due to revision of pay or to any reduction of such substantive pay otherwise than as a disciplinary measure; or
>
> (b) in exceptional circumstances, on other personal considerations.

Definition of "Pay" has been given in Rule-33 of the Orissa Service Code, which is quoted below :

> "33.(a) PAY means the amount drawn monthly by a Government servant as –
>
> (i) the pay, other than special pay or pay granted in view of his personal qualifications, which has been sanctioned for a post held by him substantively or in an officiating capacity or to which he is entitled by reason of his position in the cadre.
>
> (ii) special pay and personal pay; and
>
> (iii) any other recurring emoluments which may be specially classed as pay by the State Government.

Therefore, personal pay is also included in the definition of pay.

10. It is the basic principle of service that in no case the pay of a Government servant can be reduced either on re-appointment or on promotion. For re-appointment, the Government has clearly laid down in its notifications vide F.D. No.5059/F dated 02.02.1981 and No.20217/F dated 22.04.1981 that where a retrenched employee is appointed to a post carrying higher or lower scale of pay than that of his previous post or carrying an equal scale of pay, his initial pay in the new post should be fixed at a stage equal to the pay drawn in the previous post. Therefore, in case of promotion, the pay last drawn by the employee cannot be reduced, rather his pay is to be fixed as already instructed by the Government in the Finance Department in this regard, i.e., to add one increment to the basic pay and thereafter to add such amount by which the Government employee would have got a loss, had the amount not been included.

11. In the notification vide F.D. No. 63720(230)/F dated 07.12.1978 the following direction has been given:

> "The undersigned is directed to refer to Finance Department Office Memorandum No.24870/F dated 10.07.1969 on the subject noted above which envisaged protection of loss in emoluments of a Government servant in receipt of special pay in the lower post continuously for a period of not less than three years, on promotion to a higher post carrying no special pay. In such cases, the difference between the pay so fixed in the higher post and the pay plus special pay drawn in the lower post is allowed in shape of a personal pay to be merged in future increments."

12. The Government had issued F.D.No.15332/F dated 16.04.1971 for clarification of doubts in case of grant of personal pay, clause-6 of which is relevant and the same is quoted hereunder:

"Points of doubt	Clarification
6. Whether the personal pay can be taken as part of the basic pay for the purpose of fixation of pay in higher grade or the pay plus personal pay drawn in the lower grade should only be protected on promotion to the higher grade?	The personal pay admissible in this Department Office Memorandum of the 27th January, 1971 should not be taken into account for purpose of pay fixation under the rules. However, the pay drawn in the lower grade plus personal pay can be protected while fixing pay in the higher grade by grant of the difference, if any, as personal pay to be absorbed in future increments in the scale of the higher post. (e.g. in the case of Grade I U.D. Assistant drawing the maximum of Rs.350 in the scale of Rs.195-10-235-15-250-E.B.-15-310-20-350 plus Rs.20 as personal pay under Office Memorandum of 27th January, 1971 can, on

> promotion as J.H.A., have his pay plus personal pay protected by allowing a pay Rs.360 per month in the J.H.A. scale of Rs.345-15-20-395 plus a personal pay of Rs.10 to be absorbed in subsequent increments)."

13. In view of the above-mentioned facts and circumstances, the pay of opposite party no.1 in the next higher post, i.e, Assistant Engineer, was required to be fixed in accordance with the above quoted instruction. Therefore, the petitioner is directed to fix the pay of opposite party no.1 in accordance with the above quoted Government direction. The pay fixation of the similarly situated persons including the intervenors shall also be made. The arrears of salary, if any, shall be paid to opposite party no.1, intervenors as well as other similarly situated persons accordingly. This exercise shall be completed as expeditiously as possible, preferably within a period of four months from the date of receipt of this order. The impugned judgment and order passed by the Tribunal stands modified to the above extent.

The writ petition is disposed of with the above direction.

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I.M.Quddusi,J.

PRADIP MOHANTY,J. I agree.

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PRADIP MOHANTY,J.

Orissa High Court, Cuttack
March 2, 2006 / *Samal*